

a

UNITED ASIAN BANK BHD.

v.

KAMARIAH MOHD. YUSOFF & ORS.

HIGH COURT MALAYA, KUALA LUMPUR

ZAKARIA YATIM J

b

[SUIT NO. C24-5082-86]

8 FEBRUARY 1989

CIVIL PROCEDURE: *Setting aside default judgment - Judgment in excess - Not entitled to increase rate of interest - Ex-debito justitiae - Variation of principal agreement - No consent - Guarantor discharged.*

c

The plaintiff appealed against the decision of the Senior Assistant Registrar ordering that judgment in default against the 2nd defendant be set aside and granting conditional leave only to payment of part of the claim into Court instead of the whole sum.

The main issue was whether the loan agreement explicitly or implicitly allowed the bank to vary the rate of interest. Further, whether the 2nd defendant guarantor had consented to the variation.

*d***Held:**

[1] That the loan agreement did not explicitly or implicitly allow the bank to vary the rate of interest. As such, the judgment obtained for 13% from the date of judgment till realisation was in excess of what the plaintiff was entitled to and the defendant had the right *ex-debito justitiae* to have the judgment set aside.

e

[2] Such an increase in the rate of interest without the consent of the guarantor discharged the guarantor as to transactions subsequent to variance.

[Appeal dismissed. Costs in the cause.]

*f***Case referred to:**

Hudges v. Justin [1894] 1 QB 667

Legislation referred to:

Contracts Act 1950, s. 86

For the plaintiff - S. Sinniah; M/s. K.L. Rekhray

For the defendants - N. Segera; M/s. Zain & Co.

*g***JUDGMENT****Zakaria Yatim J:**

This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar given on 23 November 1988 ordering that judgment in default against the second defendant dated 8 August 1987 to be set aside and granting conditional leave only to payment of part of the claim into Court instead of the whole sum.

h

The plaintiff's claim against the defendants is for a sum of RM61,983.04 cents together with interest at the rate of 13% per annum on monthly rest from 1 September 1986 to the date of realisation being the moneys owed to the plaintiff on term loan credit facilities which were granted to the first defendant. The term loan and the credit facilities were granted to the first defendant on 30 December 1983.

i

The 2nd defendant stood as guarantor to the loan and the guarantee document was signed by him on 29 December 1983.

Mrs. Segera in her submission said that the guarantee was signed before the loan agreement was concluded. I think this is not proper and a guarantor is only liable from the date the guarantee agreement was signed.

A more serious question raised by Mrs. Segera was the question of interest. According to the terms of the loan agreement, interest was payable at the rate of 9% per annum. There was nowhere in the loan agreement explicitly or implicitly to allow the bank to vary the rate of interest. In the statement of claim the plaintiff is claiming an interest at the rate of 13% per annum from 1 September 1986 to the date of realisation. The writ was filed on 12 September 1986. It appears that the plaintiff has included interest at the rate of 13% from 1 September 1986 up to the time the writ was filed. The Senior Assistant Registrar gave judgment in the sum claimed together with interest at the rate of 13% per annum on monthly rests from 1 September 1986 to the date of realisation and RM598 costs. In my opinion the plaintiff had obtained judgment in excess of what they are entitled to. Under the loan agreement the plaintiff was not entitled to increase the rate of interest of 13%. Furthermore, the plaintiff was not entitled to the rate of interest of 13% from the date of judgment to the date of realisation. Since judgment was obtained in excess of what the plaintiff was entitled to, the judgment in default was clearly an irregular judgment. When the matter came up before the Senior Assistant Registrar to set aside the judgment in default he should have granted an unconditional leave to the defendant because in the circumstances of this case the defendant had the right *ex-debito justitiae* to have the judgment set aside. See *Hudges v. Justin* [1894] 1 QB 667.

I should add here there is no evidence that the second defendant, as guarantor was informed of the increase in the rate of interest. There is also no evidence that he has given his consent to such increase. Such variation in the terms of loan agreement, without the consent of the guarantor discharged the guarantor as to transactions subsequent to the variance. See s. 86 of the Contracts, Act, 1950.

The second defendant did not file any notice of appeal against the decision of the Senior Assistant Registrar. Miss Segara however in her submission raised all the issues I have just mentioned. Since the judgment which was obtained in excess of the actual amount was an irregular judgment and ought to be set aside *ex debito justitiae*, I invoke the inherent power of Court in the interest of justice in this case and order that the appeal be dismissed and the defendant be given unconditional leave to defend this action. The second defendant will file his defence within a period of twenty one days from the date of this order. Costs in the cause.

Also found at [1989] 2 CLJ 886

a

b

c

d

e

f

g

h

i